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No. 80-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G.D. SEARLE & CO.,
Petitioner,

v.

SUSAN COHN AND WALTER COHN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE RESPONDENTS

WALTER R. COHN
15 Valley Street
South Orange, New Jersey 07079
(201) 762-6444
Attorney for Respondents

On the Brief:

THOMAS E. COHN, ESQ.
RICHARD M. FLEXNER, ESQ.
15 Valley Street
South Orange, New Jersey 07079
(201) 762-6444

The Superior Appellate Printing Company, Cranbury, NJ 08512

QUESTIONS PRESENTED

1. Whether the New Jersey Tolling Provision, *N.J.S.A.* 2A:14-22, is a constitutionally valid legislative enactment, providing a rational basis for acknowledging the degrees of difficulty in first locating, and secondly, in effectuating service of process as between represented foreign corporations and non-represented foreign corporations.

2. Whether a Court may imply terms beyond the clear language and intent of the New Jersey Legislature so as to substitute its judgment for that of the Legislature.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 628 F.2d 801 and is reproduced in the Petition for Certiorari (pp. 1a-25a). The judgment of said Court appears in the Joint Appendix (pp. 74a-75a).

The decision of United States District Court for the District of New Jersey appears at 447 F. Supp. 903 (D.N.J. 1978). It is also appended to the Petition for a Writ of Certiorari (pp. 28a-49a) and to the Joint Appendix (pp. 26a-48a).

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

NEW JERSEY STATUTES AND NEW JERSEY COURT RULES

New Jersey Statutes Annotated, 2A:14-2

> Every action at law for an injury to a person caused by the wrongful act, neglect or default of any person within this state shall be commenced within two years after the cause of any such action shall have accrued.

New Jersey Statutes Annotated, 2A:14-22

> If any person against whom there is any of the causes of action specified in Sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of Article 2 of this chapter is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the Section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said Section, exclusive of such time or times of non-residence or non-representation. (Emphasis added)

New Jersey Statutes Annotated, 14A:13-3(2)(3)

• • •

(2) Without excluding other activities which may not constitute transacting business in this State, a foreign corporation shall not be considered to be transacting business in this State, for the purposes of this act, by reason of carrying on in this State any one or more of the following activities:

(a) maintaining, defending or otherwise participating in any action or proceeding, whether judicial, administrative, arbitrative or otherwise, or effecting the settlement thereof or the settlement of claims or disputes;

(b) holding meetings of its directors or shareholders;

(c) maintaining bank accounts or borrowing money, with or without security, even if such borrowings are repeated and continuous transactions and even if such security has a situs in this State;

(d) maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

(3) The specification in subsection 14A:13-3(2) does not establish a standard for activities which may subject a foreign corporation to service of process or taxation in this State.

New Jersey Statutes Annotated, 14A:13-11(2)

• • •

(2) The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this State.

New Jersey Court Rule 4:4-4(c)(1)

Service of summons, writs and complaints, shall be made as follows:

• • •

(c) Corporations, Partnerships and Associations

(1) Corporations. Upon a domestic or foreign corporation, by serving, in the manner prescribed in paragraph (a), either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

STATEMENT OF THE CASE

On December 22, 1963, Plaintiff-Respondent, Susan Cohn suffered a cerebral vascular accident (a stroke) allegedly as the result of the ingestion of a birth control pill. That event has left her left arm and left leg permanently paralyzed and has resulted in other physical and psychological injury as well. The pill was manufactured by Defendant-Petitioner, G.D. Searle & Co., a Delaware corporation with its principal office in Illinois. At that time, the hormonal concentration contained in the pill was eight to ten times greater than that contained in similar pills today. Also, there were no warning labels on the packages as there are today, advising a user that severe medical contraindications might result from use of the product. Nor was there medical evidence available linking the ingestion of birth control pills with severe side effects such as those sustained by Mrs. Cohn.

By Complaint filed January 29, 1974, Plaintiffs-Respondents Susan Cohn and Walter R. Cohn, her husband, instituted suit against Defendant-Petitioner. Their Complaint, predicated on theories of negligence, breach of warranty, statutory violations and strict liability with a per quod count for Walter Cohn, was filed in the Superior Court of New Jersey, Law Division, Essex County. On April 1, 1974 by motion of G.D. Searle & Co., the case was removed to the United States District Court for the District of New Jersey, pursuant to 28 *U.S.C.* § 1441. Jurisdiction was vested in the United States District Court under 28 *U.S.C.* § 1332.

On September 8, 1975, Defendant-Petitioner moved for an order for entry of a summary judgment and for a dismissal of the Complaint with prejudice, on the grounds that the action was barred by the Statute of Limitations, *N.J.S.A.* 2A:14-2. Plaintiffs argued that because Defendant was a foreign corporation not represented within New Jersey by "any person or officer" upon whom original process could be served, the Tolling Provision of the Statute of Limitations, *N.J.S.A.* 2A:14-22 became operative, thereby preserving Plaintiffs' cause of action.

Petitioner contended that its inability to non-suit Plaintiffs on procedural grounds as a result of the application of the Tolling Provision constituted a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

The opinion of the United States District Court for the District of New Jersey was published at 447 *F. Supp.* 903 (1978). The Court addressed itself to two issues of first impression: (1) whether or not amenability to long-arm jurisdiction created a "representation" within New Jersey within the meaning of the tolling statute, *N.J.S.A.* 2A:14-22 and (2) whether or not the tolling statute as applied to a foreign corporation subject to long-arm jurisdiction violated the Equal Protection clause of the United States Constitution. The Court decided the former issue in the negative. *Id.* at 910. As to the latter, however, the Court found that the statute denied equal protection to foreign corporations amenable to long-arm jurisdiction. *Id.* at 912.

On July 26, 1979, after a hearing on the issue of whether or not Plaintiffs were entitled to the benefit of New Jersey's equitable discovery rule, the Court rendered a second opinion. (Joint Appendix at p. 49a). This second opinion is unpublished. In summary, the rulings were: (a) that amenability to jurisdiction under the long-arm rule did not render the Tolling Provision inapplicable to Defendant; (b) that the statute deprived Defendant of equal protection and was unconstitutional; (c) that in determining the impact of the statute on Plaintiffs' case, Plaintiffs were entitled to the benefits of the discovery rule; and (d) that Mrs. Cohn's mental depression established by the proofs did not constitute a "disability" within the meaning of *N.J.S.A.* 2A:14-21, so as to toll the running of the Statute of Limitations.

Plaintiffs' motion before that Court for a new trial was denied by the Hon. Curtis Meanor on August 29, 1979. A Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed on September 14, 1979 and was docketed

on October 9, 1979. On October 18, 1979, Defendant-Respondent filed a Notice of Cross-Appeal. The case of *Cohn v Searle* was consolidated for purposes of argument and decision with the case of *Hopkins v Kelsey-Hayes, Inc.*, which pending case encompassed essentially the same issues.

While *Cohn* and *Hopkins* were pending before the Third Circuit, the New Jersey Supreme Court decided *Velmohos v Maren Engineering Corp.*, 83 N.J. 282, 410 A.2d 372 (1980). The *Velmohos* decision, involving identical issues, held: (a) that the New Jersey Legislature had decided to maintain the integrity of the Tolling Provision even with the creation of the long-arm rule; (b) the Tolling Provision acts to preserve a potential plaintiff's cause of action where the defendant might not be amenable to long-arm jurisdiction because its whereabouts outside the State would not be readily discernible; (c) the object of the Legislature was to deny to a foreign corporation without an in-state representative upon whom original process might be served the unjust reward of immunity from suit because it was secreted from view; (d) the possible use of long-arm jurisdiction over certain corporations was held not to be duplicative of the Tolling Provision since long-arm service is not available in those instances where the potential New Jersey litigant cannot guess among which of the other forty-nine states to search for its defendant; (e) the statute furthers the goal of preserving Plaintiffs' causes of action when a Defendant does not have an in-state agent for purposes of service of process; (f) the statute is rationally related to achieving a constitutionally permissible objective. Therefore, the Tolling Provision was upheld by the New Jersey Supreme Court in *Velmohos.*

In upholding the reasoning of the *Velmohos* decision, the Third Circuit then rejected the constitutional claims advanced by this out-of-state Defendant, on the basis that it was not amendable to in-state service of process due to the absence of an in-state registered agent. *Cohn*, Petitioner's Brief for a Writ of Certiorari, at pp. 15a-24a. Again, the presumption of validity given to legislative enactments and the certain, rational basis of the statute in achieving a constitutionally permissible purpose

provided the foundation for upholding the Tolling Provision. The heavy burden of demonstrating the invalidity of a legislative enactment was not remotely sustained by Defendant-Petitioner.

The July 23, 1980 decision of the Third Circuit remanded this case to the Federal District Court in order that the trial on the merits might proceed and Defendant be held accountable or not for the product it had introduced into the consumer market and which was purchased and consumed by Mrs. Cohn. Defendant-Petitioner filed its petition seeking a Writ of Certiorari on October 21, 1980. The Supreme Court of the United States granted Petitioner's Writ of Certiorari on April 20, 1981.

SUMMARY OF LEGAL ARGUMENT

On December 22, 1963, Respondent Susan Cohn suffered a cerebral vascular accident (commonly called a stroke) allegedly as the result of the ingestion of the birth control pill "Enovid", which Petitioner manufactured and sold, leaving her left side permanently paralyzed and resulting in other physical and psychological injury as well.

At all times relevant herein, Petitioner-Defendant was a Delaware corporation with its principal office in Illinois. The United States District Court for the District of New Jersey, by the Hon. Curtis Meanor, in a supplementary, unreported opinion rendered on July 26, 1979 (Joint Appendix p. 56a) determined that Respondents-Plaintiffs were entitled to the benefit of the equitable discovery rule because concrete medical evidence linking Enovid with such medical reaction was not available in 1963. The Trial Court determined that 1970 was the date of discovery. Therefore, on this basis, Respondents-Plaintiffs concede that they did not institute suit until some three and one-half years following this judicially-determined date of discovery. Respondents appealed the finding of 1970 as the proper discovery date.

Additionally, Respondents have urged that Mrs. Cohn's severe depression was an additional factor affecting the commencement of the instant action, inasmuch as said condition rendered here "insane" within the meaning of *N.J.S.A.* 2A:14-21. However, inasmuch as the Third Circuit Court of Appeals ruled in favor of Respondents on other grounds, those issues are not before this Court at the present time and still remain as issues for ultimate determination.[1]

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[1] Notwithstanding the establishment of an equitable discovery date of 1970, Respondents argued to the District Court, in the alternative, that the Statute of Limitations was tolled by *N.J.S.A.* 2A:14-21, which stops the running of the limitations period against persons who are "insane" when the cause of

(continued)

The United States Supreme Court has decreed that proscribing the nature and extent of a statute of limitation is an area which has been left within the discretion of a state legislature. "Statutes of limitation are in their nature arbitrary. They rest upon no other foundation than the judgment of a state as to what will promote the interests of its citizens. Each determines such limits and imposes such restraints as it thinks proper." *Tioga R.R. v Blossburg & Corning R.R.*, 20 Wall 137, 22 L. Ed. 331 (1873).

This Tolling Provision has been the subject of recent intensive litigation in the New Jersey State Courts (*Velmohos v Maren, supra; Hopkins v Kelsey-Hayes, Inc.*, 463 Fed. Supp. 539, (District of New Jersey, 1978) as well as in the instant proceeding in the United States Court of Appeals, Third Circuit. This judicial activity resulted in determinations by both the New Jersey Supreme Court in *Velmohos, supra*, and the United States Court of Appeals for the Third Circuit, sitting below in this consolidated suit that *N.J.S.A.* 2A:14-22 is a constitutionally valid expression of New Jersey's legislative intent; that the Tolling Provision serves the interests of the citizens of New Jersey by alleviating, to a limited extent, the hazards of commencing suit against a foreign, non-represented corporation. The public policy of adjudicating cases on the merits is furthered. Both

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[1](continued)

action accrues. Respondents argued that Mrs. Cohn's mental condition, a servere depression, brought her within the ambit of *N.J.S.A.* 2A:14-21. In the course of the same opinion wherein the District Court established 1970 as the date of discovery, that Court rejected Respondents' alternative argument, holding that Mrs. Cohn's condition did not constitute "insanity" within the meaning of *N.J.S.A.* 2A:14-21. On appeal to the United States Court of Appeals for the Third Circuit, Respondents reiterated the argument that Mrs. Cohn's severe depression constituted "insanity" within the purview of *N.J.S.A.* 2A:14-21. However, as noted in Footnote 4 of Judge Garth's opinion for the Court of Appeals, "in light of our conclusion . . . that *N.J.S.A.* 2A:14-22 tolled the running of the limitations statute in this case, we need not, and do not, reach the merits of this contention." Thus, should the judgment of the Court of Appeals be affected by this Court, this case must be remanded to the Court of Appeals for a determination on this, as well as other remaining undecided issues.

Courts dealt directly with the constitutional issues raised herein, concluding that the Tolling Provision was rationally based and in furtherance of constitutionally permissible objectives. No impact was found upon any aspect of a corporation's capacity to engage in interstate commerce as a result of the Tolling Provision. Any supposed hardship accruing to a non-represented, foreign corporation doing business in New Jersey was easily outweighed by the public policy interests in preserving causes of action and adjudicating cases upon their merits.

In evaluating the constitutionality of a statute challenged on Equal Protection grounds, the initial inquiry by the Court is to ascertain the appropriate standard of review. The nature of the interest embodied by the availability of the defense of Statute of Limitations is not a fundamental interest nor a suspect classification. *See* e.g. *Chase Securities Corp v Donaldson*, 324 U.S. 304 (1945). With respect to the Tolling Provision, *N.J.S.A.* 2A:14-22, the appropriate standard of review is "minimum scrutiny" and the statute must only be rationally related to a constitutionally permissible purpose. Petitioner has the heavy burden of displacing the presumption of validity accorded legislative enactments. *See* e.g. *Malmed v Thornburgh*, (3rd Cir., May 13, 1980) (Aldisert, J.)

The goals of the New Jersey Legislature in enacting the Tolling Provision can be summarized as follows: (1) acknowledging the difficulty of locating certain out-of-state defendants; (2) minimizing the difficulty involved in effecting service of process; (3) avoiding the burdens and costs of establishing elaborate court mechanisms to judge, on a case by case basis, whether out-of-state defendants were, in fact, "amenable to long-arm jurisdiction" by a particular plaintiff; (4) protecting the people of New Jersey from out-of-state entities which may commit torts within the state and which may be secreted from the view of the aggrieved party; (5) underscoring the public policy reasons of adjudicating claims on their merits and of denying immunity from suit to those entities which would prefer to remain unaccountable for their actions. The New Jersey Tolling Provision is directly related to achieving these constitutionally

permissible goals. The nature, extent and duration of a Statute of Limitations is specifically within the ambit of the authority of a state legislature. *Chase Securities Corp. v Donaldson, supra.*

The application of the Tolling Provision has no impact upon Petitioner's ability to sell and transport its products in the New Jersey marketplace. Petitioner has not even attempted to demonstrate any impact whatsoever on its capacity to conduct its commercial activities as a direct result of the denial of the availability of the defense of Statute of Limitations. In any event, not all burdens upon commerce, but only undue or discriminatory ones, are proscribed by the Commerce Clause of the Federal Constitution. *Breard v City of Alexandria, La.*, 341 U.S. 622; Rehearing denied, 342 U.S. 843 (1951).

Congress' choice not to pre-empt each state's authority to enact its own Statute of Limitations evidences the absence of a need for national uniformity in this area. This statute cannot logically be said to prefer domestic corporations to foreign corporations with respect to their capacity to conduct business in New Jersey.

In *Velmohos, supra,* Justice Pashman, at p. 14a of Respondents' Brief in Opposition to Writ of Certiorari, n. 10, stated that foreign corporations can limit their exposure to suit simply by designating an in-state agent to accept service of process within the State. This is the state of the law in New Jersey. Therefore, Petitioner's argument that it must fully domesticate in New Jersey in order to obtain the benefits of the Statute of Limitations is wholly without merit. Because the statute does not violate any provision of the United States Constitution, the decision of the United States Court of Appeals for the Third Circuit should be affirmed.

POINT I

THE INTERPRETATION OF THE TOLLING PROVISION BY THE NEW JERSEY SUPREME COURT IS DISPOSITIVE OF THE STATUTORY CONSTRUCTION AND COURTS DO NOT INTERPOSE THEIR JUDGMENT FOR THAT OF THE STATE LEGISLATURE.

Subpoint A — THE DETERMINATION BY THE NEW JERSEY SUPREME COURT THAT THE TOLLING PROVISION'S PHRASE "REPRESENTED IN THIS STATE" MEANS DESIGNATION OR APPOINTMENT OF AN AGENT WITH THE NEW JERSEY SECRETARY OF STATE IS DISPOSITIVE OF THE STATUTORY CONSTRUCTION.

The ruling of the highest appellate court of a state in construing the applicable state statute of limitations must be followed by the federal courts and that construction is as binding upon the courts of the United States as the text of the statute itself. *See e.g. Moore v Illinois Central R. Co.* 312 U.S. 630 (1941); *Standard Oil Co. v Tennessee*, 217 U.S. 413 (1910); *Williams v State of Oklahoma*, 348 U.S. 576, rehearing denied, 359 U.S. 956 (1959); See also the opinion below of the Third Circuit Court of Appeals, at p. 13a, n. 8 of Petition for Writ of Certiorari. The New Jersey Tolling Provision deals with the concept of representation within the State. The goal of the Legislature is to provide plaintiffs or their attorneys with access to an in-state representative specifically for purposes of service of process. By contacting the New Jersey Secretary of State, a plaintiff can ascertain whether or not a business entity has so designated an in-state agent. In the *Velmohos* decision, the New Jersey Supreme Court definitively established the significance of the words of the statute. The Court said:

> While Courts of other States have construed Tolling Statutes to be inapplicable to foreign corporations subject to

> long-arm service, the statutes involved were phrased in terms of "absence" from the State — general language, which more readily lends itself to flexible interpretation . . . the New Jersey statute, however, is very narrowly drawn. It speaks not of presence or absence, but of representation within the State. Such language must be interpreted from the intent of the Legislature in light of the circumstances at the time of enactment . . . as Defendants themselves recognize, the circumstances prevailing at the time of the 1949 amendment did not include long-arm service on foreign corporations. We cannot accept the invitation to adopt this latter development as the premise for ignoring clear and unambiguous statutory language. *Velmohos, supra,* Respondent's Appendix, p. 12a.

Certainly, the United States Supreme Court decides Federal Constitutional issues and applies state statutes to constitutional questions. In New Jersey, the Tolling Provision becomes operative when no in-state representative for purposes of service of process is known to the Secretary of State. *Velmohos, supra.* At one time, Petitioner herein did have such a representative in New Jersey. However, in 1960 it opted to withdraw this representative for reasons of its own choosing.

The interpretation of the Tolling Provision by the New Jersey Supreme Court is similar to decisions in California, Texas, Ohio, South Carolina and North Carolina. (For California, see *Dew v Appleberry*, 23 Cal.3d. 630, 591 P.2d 509 (1980); for Texas, *Vaughn v Deitz*, 430 S.W.2d 487 (Tex. 1968); for North Carolina, see *Duke University v Chestnut*, 28 N.C. App. 568, 221 S.E.2d. 895 (1976). See also: *Zalatuka v Metropolitan Life Insurance Co.*, 90 F.2d 230 (7th Cir. 1937). (state legislature may distinguish between domestic and foreign insurance companies for purposes of determining time within which suits on insurance policies may be instituted or be forever barred.) Petitioner's brief is inaccurate and misleading in two respects when it states the *Velmohos* decision places New Jersey in a minority of jurisdictions: (1) as stated by Justice Pashman in n. 8 of the New Jersey Supreme Court opinion, Respondents'

Brief in Opposition, p. 12a, "Our result, today, differs from those of other Courts because of a difference of statutory language, not a defect in reasoning. Without describing and comparing the various tolling statutes that have been interpreted, any reference to "majority" and "minority" rules is meaningless, and (2) because so many of the other state statutes cited by Petitioner deal with service upon the Director of the Division of Motor Vehicles in non-resident driver cases. Such rules of service, applicable only in motor vehicle cases, reflect an idiosyncratic policy decision and are not a logical foundation for extrapolation into other areas of the law.

The decision of the Third Circuit Court of Appeals further underscores the significance of carefully examining the statute itself, rather than adopting the tortured re-working of the statute urged by Petitioner. Judge Garth noted that:

> ...the tolling provision speaks of individuals who "represent" rather than just "act" for the foreign corporation in New Jersey. By contrast, the applicable Court rules of service speak only of "servants" who merely "act" in New Jersey. See *N.J. Court Rule* 4:4-4 (c)(1). It appears to us, therefore, that the statutory tolling provision contemplates a much more significant corporate figure or presence — one capable of "representing" the corporation — than does the service rule. This higher standard, which requires "representation" in New Jersey, before a foreign corporation can receive the benefits of the limitation statute, comports with the original purpose of the Tolling Rule: to permit plaintiffs who have causes of action against foreign corporate defendants, which are not represented in New Jersey, to maintain the viability of their actions despite the passage of time. Moreover, this purpose is consistent and comparable with New Jersey's policy of liberally construing the limitation statute so as to preserve, wherever possible, a plaintiff's opportunity to litigate his claim on the merits. *Cohn, supra,* Petitioner's Appendix, p. 17a (emphasis added).

"Represented" cannot be ignored as Petitioner urges and the

significance of the word "represented" in the New Jersey tolling statute cannot be underestimated. The goal of the State Legislature was to provide plaintiffs or their attorneys with access to defendants by contacting the New Jersey Secretary of State to determine whether or not that entity had designated an in-state agent for purposes of service of process. No showing has been attempted to prove that this is an impermissible objective.

Subpoint B — COURTS DO NOT INTERPOSE THEIR JUDGMENT FOR THAT OF THE STATE LEGISLATURE.

The New Jersey Legislature chose to draw a distinction between mere amenability to service of process under the long-arm rule and actual representation within the State. Such legislative distinction has been upheld as rational in the instant case, in *Velmohos, supra,* and in *Hopkins v Kelsey-Hayes, Inc., supra.* Now Petitioner seeks to have this Court strike the state statute because it believes that judges can write a statute more to Petitioner's liking. Such a determination would result in a collision of the authority of two branches of government and overturn the constitutionally established concept of separation of powers. *See e.g.* Judge Brotman's decision in *Hopkins v Kelsey-Hayes, Inc., supra,* at pp. 29a-30a of Respondents' Brief in Opposition to Writ of Certiorari. Courts do not sit as superlegislatures and are not to determine the wisdom, need or propriety of statutory law. *Griswold v Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 1680 (1965).

In *Velmohos, supra,* Justice Pashman responded to the argument of the Defendant therein that the Tolling Statute had become irrelevant and redundant by virtue of the existence of long-arm jurisdiction. In rejecting this argument, the Court acknowledged the weight that must be accorded a legislative enactment: "Defendant's position is unconvincing. It would require us to incorporate into the Tolling Statute changes in another area of the law, which were made after its passage." *Velmohos, supra,* Respondent's Appendix, p. 12a.

The New Jersey Tolling Statute was last amended in 1949, at which time the language was broadened to specifically encompass the corporate defendant. The amendment exempted from the Tolling Statute domestic corporations, as well as foreign corporations having representatives in the state. Justice Pashman, in *Velmohos,* following a discussion of the legislative history of the Tolling Statute, made note of the fact that the 1949 Amendment occurred four years after the landmark case of *International Shoe Machinery Company v Washington*, 326 U.S. 310 (1945). In that case, the United States Supreme Court held that a state's jurisdictional powers extend beyond its borders to reach those entities which have "certain minimum contacts" with the state. Thus, one cannot logically argue that the New Jersey Legislature was unaware of the availability of long-arm jurisdiction in 1949:

> The legislature must be presumed to have been aware of this development when it acted to remove only represented corporations from the Tolling Provisions of *N.J.S.A.* 2A:14-22. In the absence of legislative action, expressly incorporating the amenability to long-arm service as an exemption from the Tolling Statute, that class of foreign corporations remains subject to its effect. *Velmohos, supra,* Respondents' Appendix, p. 14a.

Thereafter, in 1958, the New Jersey Supreme Court chose to promulgate a long-arm service rule, *R.* 4:4-4 (c)(1). This rule was intended as a corollary to, and not a displacement of, the legislative enactment embodied in the Tolling Provision, as amended in 1949. Judicially-created implied repealers have been continuously rejected by this Court.

Among the many reasons why a legislative enactment has such a strong presumption of validity, is the fact that once such an enactment becomes the law of the state, it is presumed that affected persons are cognizant of it and abide by it. Therefore, given the long standing rule of separation of powers, and further taking into account the reluctance of the judiciary to tamper with statutory expressions of legislative intent, it is

evident that only in the most extreme cases of legislative abuse should a court act to render such a statute unconstitutional. Further, given the highly rational basis for enactment of the New Jersey Tolling Provision, especially with respect to non-represented foreign corporations, and giving credence to the legislative history which clearly contemplates the existence of long-arm jurisdiction at the time that *N.J.S.A.* 2A:14-22 was amended in 1949, the Tolling Provision is neither irrational, nor vague nor ambiguous. As such, it should remain intact.

If the Tolling Provision is now found to be unconstitutional, the reliance placed thereon by Respondents will result in the dismissal of a cause of action having not only great personal value, but societal value as well. Petitioner has argued throughout the course of these proceedings that the delay in filing the instant action has caused it prejudice; yet, no proof of such has been forthcoming. Indeed, the longest time period involved in the within case stems from the fact that the medical knowledge linking the high doses of hormones in Petitioner's product with severe physical side effects was not in existence at the time of Mrs. Cohn's stroke. Respondents' reliance upon the efficacy of the Tolling Provision is justified. The damage which would result to Respondents due to that reliance, were the Court to find the statute unconstitutional, is abundant and clear.

POINT II

THE NEW JERSEY TOLLING STATUTE, *N.J.S.A.* 2A:14-22 IS A CONSTITUTIONALLY VALID LEGISLATIVE ENACTMENT UNDER THE DUE PROCESS, EQUAL PROTECTION AND COMMERCE CLAUSES OF THE CONSTITUTION OF THE UNITED STATES AND IS RATIONALLY RELATED TO A CONSTITUTIONALLY PERMISSIBLE GOAL.

Respondents herein respectfully submit that *N.J.S.A.* 2A:14-22, the New Jersey Tolling Statute, is constitutionally valid pursuant to the Due Process, Equal Protection and Commerce Clauses of the United States Constitution. Therefore, the validity of said statute should be sustained. The United States Court of Appeals for the Third Circuit below and the New Jersey Supreme Court, *Velmohos, supra,* have decreed that the rational basis of the New Jersey Tolling Statute meets constitutional standards and furthers constitutionally permissible objectives.

Subpoint A — THE TOLLING PROVISION SURPASSES THE REVIEW STANDARD OF "MINIMUM SCRUTINY", FURTHERS A LEGITIMATE STATE OBJECTIVE, AND SATISFIES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION.

The Tolling Statute under consideration involves neither a fundamental interest nor a suspect classification. *See: Lemke v Bailey*, 41 N.J. 295, 196 A.2d 523 (1963). In fact, as noted by the Court below, Petitioner has conceded this. Moreover, as stated in n. 12 of the opinion of the Court of Appeals at p. 18a of Petitioner's Brief for a Writ of Certiorari, such a concession would seem to be compelled by *Campbell v Holt*, 15 U.S. 620 (1885). Thus, the standard of review for the statute is that it must survive minimum constitutional scrutiny and be "rationally

related to a constitutionally permissible purpose". The pertinent observation that the nature, extent and duration of the privilege legislatively created by a statute of limitations is embodied in *Chase Securities Corp. v Donaldson*, 325 U.S. 304 (1945):

> They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable [sic] and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shield has never been regarded as what is now called a "fundamental" right or what used to be called a "natural right of the individual". *Chase Securities*, at p. 314.

On this basis, it is clear that the proper standard of review for the challenge to New Jersey's Tolling Statute, is the "rational basis" test. *Velmohos, supra*, and *Chase Securities, supra*. Petitioner must fully overcome the substantial burden of proving that the statute is irrational:

> In reviewing a state statute or constitutional provision under either the Due Process or Equal Protection clause, a court must determine if the provision rationally furthers any legitimate state objective. "For these purposes, it is of course, constitutionally irrelevant whether this reasoning in fact underlied the legislative decision . . ." *Flemming v Nestor*, 363 U.S. 603, 612 (1960). The Court might even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack. See *Weinberger v Salfi*, 422 U.S. 749, 780 (1975); *Williamson v Lee Optical Inc.*, 348 U.S. 483, 487-490 (1955); *Trafelet v Thompson*, 594 F.2d. 623, 626 (7th Cir.), Cert. denied, 48 U.S.L.W. 3239 (Oct. 1, 1979). *Cohn, supra*, at Petitioner's Brief for a Writ of Certiorari, at p. 19a., quoting *Malmed v Thornburgh*, 79-2467, slip opinion at 7, (3rd Cir., May 13, 1980) (Aldisert, J.) (emphasis in original).

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in *Velmohos, supra,* laid to rest Petitioner's contention that no basis exists for delineating between corporations represented in New Jersey and foreign corporations without a representative for purposes of service of process:

> This distinction between represented and non-represented foreign corporations reflects the pragmatic difficulties which may be encountered by plaintiffs suing foreign corporations. Since service of process under the long-arm statute is more difficult and time-consuming to achieve than service within the state, and since out-of-state, non-represented corporate defendants may be difficult to locate let alone serve, tolling the statute of limitations protects New Jersey plaintiffs and facilitates their lawsuits against such defendants. Because the tolling provision fulfills the legitimate state purpose of easing the special burdens of suits against non-represented foreign corporations, we cannot say that the distinction which it recognizes is irrational. *Cohn, supra,* Petitioner's Appendix, p. 23a; *Accord: Hopkins, supra.*

The rationale behind the Legislature's desire to preserve the Tolling Provision in the face of the advent of long-arm jurisdiction is clear: Notwithstanding the fact that some New Jersey litigants may be able to locate and effectively serve process upon large, well-known foreign corporations pursuant to long-arm service, a plaintiff's task of effecting process is facilitated by the designation of a proper corporate representative within the state. But the necessity of the Tolling Provision is most convincingly demonstrated by those cases in which the foreign corporation cannot be located at all or not for a very long period of time, rendering the long-arm rule wholly impotent. It would be of little comfort to the injured party to learn that having found its "unrepresented defendant" long-arm service was unavailable because the Statute of Limitations barred his or her suit. The physical location of some out-of-state corporations cannot be ascertained regardless of the measures taken by an aggrieved party, and in those instances, the Tolling Provision is essential in preserving causes of action and denying secreted defendants immunity from answering for their actions.

Even with the judicial creation of the long-arm service rule, a valid, rational basis exists for distinguishing between represented and non-represented foreign corporations. Among such foregn corporations, there are degrees of difficulty in effecting service, if indeed, service can be made at all. This constitutes an independent rationale of the New Jersey State Legislature. *Velmohos, supra.* Petitioner's argument that the New Jersey Tolling Statute violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution must fail. The Equal Protection Clause does not require that statutes be drawn with mathematical nicety. *Cleveland v National College of Business*, 435 U.S. 213, 221 (1978). Therefore, because it acted within the scope of its authority and because it evidenced valid objectives, the New Jersey Legislature's Tolling Provision is rationally related to a constitutionally permissible purpose.

Subpoint B — THE STATUTE IS CONSTITUTIONAL BECAUSE THE STATE'S INTERESTS ARE SUBSTANTIAL, THE BURDENS ON NON-RESIDENT CORPORATIONS ARE NEGLIGIBLE AND THE BURDENS ON INTERSTATE COMMERCE ARE NON-EXISTENT.

The inability to raise the defense of Statute of Limitations is not the type of impermissible burden on interstate commerce which this Court has heretofore condemned. Petitioner has not presented a scintilla of evidence that the lack of the availability of the defense of the Statute of Limitations has in any manner affected its capacity to engage in interstate commerce. Nor have its business decisions been in any way influenced by the New Jersey Tolling Provision. Obviously, the New Jersey Legislature recognizes the federal limitation on the ability of the States to

impose burdens on a foreign corporation's in-state activities while conducting interstate commerce.[2]

Petitioner asks that this Court believe that in those instances where a non-represented, foreign corporation is denied the defense of the Statute of Limitations, it is denied the use of all other available privileges of New Jersey law. This is just not so. If a plaintiff's delay is inexcusable and results "in prejudice to the defendant, the latter may raise the equitable defense of laches to bar the claim".[3]

In those instances in which this Court has struck down state statutes on Commerce Clause grounds, it has been because either (a) there existed a need for national uniformity in a given subject or (b) the state statute constituted economic protectionism and furthered no valid state interest. "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Cooley v Board of Wardens,* 53 U.S. 299, 319 (1951). Where national uniformity is not required, such as the specific extent and duration of the privilege embodied by the various Statutes of Limitations, or such as the standards encompassed in divorce law, the field is a proper one for state legislation. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden

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[2] *N.J.S.A.* 14A:13-11(2) recognizes that a foreign corporation need not qualify in order to engage in interstate commerce. This statute provides: "The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this State." *N.J.S.A.* 14A:13-3(2) provides that a corporation may act in the State, engage in interstate commerce, maintain, defend, participate in any action or proceedings, judicial, administrative, arbitrative, or otherwise; hold meetings of directors or shareholders; continuously maintain bank accounts and borrow money, maintain offices or agents to handle securities, etc. and still not be required to obtain a Certificate of Authority from the State of New Jersey.

[3] *Velmohos, supra,* at Respondent's Brief in Opposition, p. 14a, n. 10.

imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In the instant case, Petitioner cannot cite even one burden on interstate commerce arising as a result of the application of this statute, because none exist. Indeed, it has operated freely in New Jersey for many years, selling its products and earning its profits. Since there is no requirement for an out-of-state corporation to obtain a Certificate of Authority in New Jersey,[4] all the alleged burdens cited by Petitioner are inapplicable. Nowhere does Petitioner evidence any impact upon its ability to operate in the New Jersey market as a direct result of the application of the Tolling Provision.

When construing the validity of a state statute in light of a challenge under the Commerce Clause, the burden of proof of invalidity is necessarily upon the party attacking the statute. State statutes are of "equal dignity" when measured with the Commerce Clause. *Bibb v Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). Not all burdens upon commerce, but only undue or discriminiatory ones, are forbidden by the Commerce Clause of the Federal Constitution. *Breard v City of Alexandria, La.*, 341 U.S. 622; Rehearing denied, 342 U.S. 843 (1951). By being unable to invoke the protection of the Statute of Limitations and having to rely upon the defense of laches, the only consequence befalling a non-represented foreign corporation is a possible dimunition in its opportunity to escape accountability for its actions. This alleged consequence is not commerce related.

Petitioner argues that the Tolling Provision is per se invalid because it constitutes a "substantial, direct or unjustified" burden. But no such burden has been demonstrated. Furthermore, the cases and authorities upon which Petitioner relies are inapplicable to the matter before this Court. The line of authority urged by Petitioner involves instances in which states have sought affirmatively to prevent foreign corporations from

[4]See *N.J.S.A.* 14A:13-11(2) and *N.J.S.A.* 14A:13-3(2) on page 23 above.

engaging in interstate commerce within the state. By contrast, New Jersey's Tolling Provision does not seek to, nor does it have the effect of, limiting any commercial activity whatsoever. In fact, a foreign corporation may relieve itself of the effects of the statute merely by appointing an agent within the state to accept service of process. This is the state of the law in New Jersey. See Justice Pashman in *Velmohos, supra,* Respondents' Brief in Opposition to Certiorari, at p. 14a, n. 10 and New Jersey Rules of Court, *R.* 4:4-4 (c)(1). (Petitioner's Brief at p.6).

All of the cases cited by Petitioner in support of its per se theory, involve affirmative attempts by states to restrict trade, as in the "drummer" cases. *Sioux Remedy Co. v Cope,* 235 U.S. 197 (1914) involved a South Dakota provision affirmatively preventing a foreign corporation from bringing suit within the state, to collect payment on a contract made with a citizen of the state and pursuant to which goods were delivered into the state, unless the foreign corporation rendered itself amenable generally to suit there. The difference in impact between the subject Tolling Provision and the statute in *Sioux Remedy* is that the latter deprives a foreign corporation of an affirmative right necessary to the proper conduct of interstate commerce, that being the right to enforce a contract, while the Tolling Provision does not result in any restriction upon the capacity to do business. Moreover, the Court in *Sioux Remedy* determined that the South Dakota law bore "no natural or reasonable relation to the right to sue". By contrast, the Tolling Provision is, by its nature, intimately connected with the Statute of Limitations and service of process, thereby furthering the objectives, cited above, of the New Jersey Legislature. The Tolling Provision is merely a limitation upon the privilege conferred by the State Legislature.

Allenberg Cotton Co. v Pittman, 419 U.S. 20 (1974) upon which Petitioner also relies, involved an affirmative attempt by the State of Mississippi to deny a foreign corporation access to its courts to enforce a contract. *Allenberg* held only that "Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the

Constitution." *Allenberg, supra,* p. 35. This case, like *Sioux Remedy*, simply has no bearing on the case at hand. No fundamental aspect of litigation, let alone interstate commerce, is impaired by application of the Tolling Provision. The statute under attack in the instant case preserves access to the judicial process, as opposed to the effect of the statute in *Allenberg*, which was to deny access.

The benefits provided by the Tolling Provision to the citizens of New Jersey are substantial and clearly outweigh any alleged burdens mentioned by Petitioner. Both the New Jersey Supreme Court in *Velmohos, supra,* and the Court of Appeals, below, utilized a "balancing test" in evaluating the statute's benefits to the citizens of New Jersey and its impact on interstate commerce. Among these significant benefits are the following:

1. An acknowledgment of the difficulty of locating certain out-of-state defendants, because they are either circumstantially or intentionally secreted from the view of a potential New Jersey plaintiff.

2. An understanding of the degrees of difficulty involved with service of process; even in those instances where a defendant can be located, a plaintiff has the burden of proving to a Court by affidavit that after diligent inquiry, no in-state representative is available and must also gather information to conclusively satisfy the Court that service of process under the long-arm rule is consistent with due process.

3. Avoidance of the necessity to set up an elaborate, alternative mechanism by which courts would be forced to determine on a case-by-case basis which out-of-state corporations are or are not amenable to long-arm service by a particular plaintiff. Each such determination would entail an evaluation of subjective criteria and would turn upon degrees of visibility of various corporations and levels of knowledge of the whereabouts of a corporation by a plaintiff.

4. Establishing protection for New Jersey litigants from foreign corporations which may commit torts within the State and which may be secreted from the view of the aggrieved party.

5. Public policy reasons, including adjudicating claims on their merits; preserving plaintiffs' causes of action; and fostering accountability of the corporate defendant. This rationale is particularly appropriate in the instant case. These benefits easily outweigh any alleged burdens claimed by Petitioner.

The so-called "burden" claimed by Petitioner to be created in the instant case is not by nature or by degree the type condemned historically by this Court as an over-stepping by a state legislature. Certainly no need for national uniformity with respect to the nature, extent and duration of statutes of limitations is apparent. The burden Petitioner claims to have been erected by the application of the Tolling Provision is not of the category or degree acknowledged by this Court to date. The Court has struck down regulations where they either interfere with a corporation's capacity to engage in inter-state commerce or amount to mere economic protectionism by a state. Instances include: *Southern Pacific Co. v Arizona*, 325 U.S. 761, (1945) (a state regulation prohibiting trains with more than a certain number of cars interferes with commerce beyond any demonstrated safety interest); *Pike v Bruce Church, Inc.*, 397 U.S. 137 (1970) (Arizona statute to force growers to pack cantaloupes in-state invalid as furthering no valid state interests and amounting to economic protectionism). However, where a negligible impact arises, this Court has upheld state statutes as not creating impermissible burdens, such as where a statute required a motor carrier to obtain a license to transport interstate. See *Lloyd Fry Roofing Co. v Wood*, 344 U.S. 157 (1952).

Petitioner argues that if it chose to obtain a Certificate of Authority in New Jersey, it would be subject to all types of foreign actions. This line of attack by Petitioner is without substance in light of the "minimum contacts" test of *International Shoe Co. v Washington*, 326 U.S. 310 (1945). Denial of the privilege of the Statute of Limitations is not tantamount to denial of due process in New Jersey as urged by Petitioner. Litigants from other states cannot take advantage of the Tolling

Provision in New Jersey law if their state statutes bar suit. In addition to the "minimum contacts" test, the principles of *H.J. Govan vs Trade Bank and Trust Co.*, 109 N.J. Super 271, (N.J. App. Div. 1970) and *Marsh v Davis*, 99 N.J. Super 130 (1968) still apply. Therefore, the application of the Tolling Provision is limited to those instances in which the cause of action arose in New Jersey or the aggrieved party is a New Jersey resident. See also: *Zwillenberg v Post*, 293 F.2d 199 (3rd. Cir. 1961). Therefore, Petitioner's argument that it will be subject to foreign causes of action must fail.

Thus, the subject statute in no way restricts the ability of Petitioner to engage in interstate commerce. The evidence of the continuous vitality of Petitioner's business activities within the State of New Jersey to this very day is the most powerful refutation of Petitioner's arguments. The Tolling Provision in no way impacts upon Petitioner's capacity to engage in interstate commerce within the State of New Jersey, nor does it violate any provision of the United States Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the United States Court of Appeals for the Third Circuit be affirmed, and that this matter be remanded to the Federal District Court for the District of New Jersey in order that the trial on the merits might proceed.

Respectfully submitted,

WALTER R. COHN
15 Valley Street
South Orange, New Jersey 07079
(201) 762-6444
Attorney for Respondents

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